IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1111

JULIUS GERZOF, also known as JULIUS M. GERZOF,

Plaintiff-Appellant,

against

FRANK A. GULOTTA, individually and as Presiding Justice, Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, J. IRWIN SHAPIRO, MARCUS G. CHRIST, FRED J. MUNDER, JOHN P. COHALAN, JR., JAMES D. HOPKINS, ARTHUR D. BRENNAN, A. DAVID BENJAMIN, HENRY J. LATHAM, M. HENRY MARTUSCELLO, individually and as Associate Justices of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, and IRVING N. SELKIN, individually and as Clerk of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF OF APPELLANT GERZOF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Statement

Appellant Julius Gerzof submits this brief in opposition to Appellees' motion dated February 11, 1976 to dismiss or affirm his appeal.

Appellees' invocation of their version of this Court's holding in *MTM, Inc.* v. *Baxley,* 420 U.S. 799 (1975), manifests a profound misconception about what the Court below actually did. While there is no doubt that Judge Neaher believed that "prevailing standards of federalism" made abstention appropriate here (4a, 33a)*, that fact must be the beginning and not the end of inquiry.

For one thing, Judge Neaher's statements are contained in his opinion and not in the judgment of the Court. But it is the judgment which provides the yardstick by which to measure appealability, and whether or not an appeal lies herein under 28 U.S.C. §1253 depends not so much upon what Judge Neaher said, but upon what he and his brethren actually did. Judge Neaher's expressed preference for abstention is, moreover, not only inconsistent with, but completely overshadowed by, his extensive discussion and resolution of the merits of Appellant's constitutional claim.

It is respectfully submitted, therefore, that a reading of the three opinions and the judgment below compel the conclusion that the resolution of this case below necessarily ". . . rest[ed] upon the merits of the constitutional claim presented . . .", *MTM, supra,* at 804, for the following reasons:

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* All references are to appendices annexed to Appellant Gerzof's Jurisdictional Statement.

1. Fully 24½ of the 31½ printed pages comprising the text of Judge Neaher's opinion were devoted to the factual background and the merits of Appellant's constitutional claims. In the course of those 24½ pages Judge Neaher examined, in great detail, the merits of those claims and rejected them. Thus, while he may have resolved the merits against Appellant, *the fact remains that he resolved them,* and that only after resolving them did he discuss the applicability of the abstention doctrine (27a-33a).

Nor is there any doubt that Judge Moore's dismissal was on the merits (34a). In fact, the point of his separate concurrence seems to have been to insure that the majority opinion would not be misinterpreted in the light of *MTM* to foreclose this appeal since he believed that this case presented a:

> ". . . *constitutional* question . . . of sufficient importance to be resolved by our highest court . . .". [Emphasis added] (43a).

Judge Weinstein's dissenting opinion clearly reached the merits and resolved them in Appellant's favor (38a-106a) and, thus, two of the three members of the Court below clearly based their opinion upon the merits. While Judge Neaher may have desired to abstain, a close reading of his opinion establishes that he did not do so.

2. The judgment entered by the Court below is couched in the standard language of dismissal on the merits— ". . . that the plaintiff take nothing of the defendants and that the complaints are dismissed" (108a). It contains, therefore, no language of abstention, nor any other sug-

gestion that the dismissal was not on the merits. *Cf.* 3 Bender's Federal Practice Forms No. 3224, p. 399; esp. fn. 3: ("The judgment should clearly state the ground for dismissal in order to avoid any future question as to its effect . . ." at p. 408.)

3. The Court below unanimously agreed that ". . . serious procedural and substantive issues . . ." were presented by this case (33a), and, therefore, unanimously agreed to continue the stay of disciplinary action against Appellant. But Judge Neaher's action in continuing the stay was so clearly inconsistent with abstention, as he himself recognized,* as to establish that no matter what he might have ". . . believe[d] these cases call for . . ." (33a), that what he actually did was dismiss on the constitutional merits.

Appellees correctly note that Appellant Gerzof filed a protective appeal to the United States Court of Appeals for the Second Circuit. However, they are apparently unaware that on January 15, 1976 that appeal was dismissed for failure to comply with the Court's Civil Appeals Management Plan. Accordingly, it is respectfully requested that, if this Court determines that the requisite jurisdiction is not present here, that it remand the case to the Court below with instructions to enter a fresh judgment so that a timely appeal may be prosecuted to the Court of Appeals. *MTM, supra,* at 804.

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* ". . . [I]ssuing a stay of a final judgment of a State court is at least a significant intrusion into state matters as enjoining prosecution of disciplinary proceedings prior to judgment" (28a).

Conclusion

No matter what Judge Neaher *said*, what the Court below *did* was to reach and dismiss the merits of Appellant's constitutional claim. This Court, therefore, has appellate jurisdiction under 28 U.S.C. §1253. For all the reasons stated in Appellant's Jurisdictional Statement, the constitutional questions raised are substantial and, therefore, this Court should note probable jurisdiction and set this case down for a plenary hearing, or, in the alternative, summarily reverse the decision below.

Dated: New York, New York
February 19, 1976

Respectfully submitted,

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